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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RICHARD RUDI,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTIONS PRESENTED

1. Where a State court trial judge denies a motion to nolle prosequi made solely to obtain a continuance previously denied, and orders the prosecution to commence trial, an order which is refused, and the trial judge thereupon commences trial, orders the defendant sworn as a witness, and, hearing insufficient evidence to sustain a conviction, acquits defendant, is that acquittal a bar to the subsequent prosecution for the same offense under the double jeopardy clause of the Fifth Amendment to the United States Constitution, even where a State reviewing court holds that the trial court abused its discretion in denying the motion for continuance, and the motion to nolle prosequi the charge?

2. For purposes of the double jeopardy clause of the Fifth Amendment to the United States Constitution, is a bench trial commenced when a witness is sworn even if no testimony is presented?

3. In this case, is the ruling of the Illinois Supreme Court in direct conflict with the decision of the Fourth Circuit Court of Appeals in Goolsby v. Hutto, 691 F.2d 199 (4 Cir. 1982), such that this Court should grant certiorari to resolve the conflict?

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PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Petitioner, Richard Rudi (hereafter, defendant) respectfully prays that a Writ of Certiorari be issued to the Illinois Supreme Court to review its decision directing the trial court to vacate its judgment of "not guilty" and requiring the trial court to allow the State's motion for nolle prosequi.

Judgments and Opinions Below

The order of the Supreme Court of Illinois, Agenda 3 - May, 1984, Docket No. 58470, affirming the Appellate Court decision and entering supervisory order is not reported, but is set out as Appendix A. The Illinois Appellate Court decision, also unreported, is set out in Appendix B.

Jurisdictional Statement

On September 20, 1984, the Supreme Court of Illinois entered its opinion affirming the decision of the Illinois Appellate Court and directing the circuit court to vacate the judgment of acquittal and allow the State's motion for nolle prosequi. This petition to review the judgment of a State court of last resort in a criminal case is timely filed within

60 days thereafter. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3) and Rule 20.1.

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides, in part:

> Section 1. ...(N)or shall any State deprive any person ... of liberty ... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant was charged with the felony of aggravated battery, unlawful restraint and the misdemeanor of battery. He was convicted of misdemeanor battery in a jury trial. The conviction was reversed by the State Appellate Court and the cause remanded for new trial. Defendant was retried at a bench trial and found not guilty. The State refiled the charge of misdemeanor battery arising from the same circumstances, and the trial court granted defendant's motion to dismiss the information on the ground of double jeopardy. The State appealed, and the Illinois Appellate Court rejected defendant's double jeopardy claim, and reversed. (Appendix B) Defendant petitioned the Illinois Supreme Court, which granted a hearing. After review,

the Illinois Supreme Court rejected defendant's double jeopardy claim, affirmed the Illinois Appellate Court, and directed the State trial court to vacate the judgment of not guilty and allow the State's motion for nolle prosequi. (Appendix A)

The Illinois Supreme Court held that the double jeopardy clause of the Fifth Amendment as applied to the States by the Fourteenth Amendment does not operate to bar retrial here, because the rulings which led to the acquittal were, in the opinion of the court, invalid under State law--the trial court abused its discretion in forcing the prosecution and defendant to trial.

STATEMENT OF FACTS

Defendant, Richard Rudi, was originally charged with the felony of aggravated battery, battery and unlawful restraint, arising from an alleged misconduct on July 26, 1976. Following a jury trial he was acquitted of the felony charges and convicted only of misdemeanor battery and fined $1,000. On appeal, the Illinois Appellate Court reversed and remanded for a new trial. People v. Rudi, 94 Ill.App.3d 856, 419 N.E.2d 646, 50 Ill.Dec. 538 (1981).

Upon remand, on February 17, 1982, the trial court entered an order setting this matter for trial:

> "This matter is set for jury trial on April 13, 1982 at 9:00 a.m. without further notice." (C. 156)

On March 3, 1982, this matter was again before the trial court on

defendant's motion to obtain a list of the State's witnesses. (C. 159) Assistant State's Attorney Nancy K. Wilson complied with that discovery motion on or about March 15, 1982. (R. 160)

On April 13, 1982, the date set for trial, Assistant State's Attorney Wilson announced that the State was not prepared to proceed. (C. 411) Wilson instead filed an affidavit in which she said that she had been misinformed as to the correct trial date. (C. 163-166) She asserted that the State's file failed to contain the trial date and that an unidentified person at the Clerk's Office had informed her that the trial date was April 16, a Friday, rather than April 13, a Tuesday. (R. 163) She asserted that the State's witnesses had been subpoenaed

for Friday and therefore she was unable to proceed. (C. 163-165) Assistant Wilson did not state when or how she learned that she was misinformed, and whether, upon learning of the correct date, she made any effort to have the State's witnesses available on Tuesday rather than Friday.

The trial court, in responding to the State's request for a continuance to Friday, reminded the Assistant State's Attorney that jury trials were not started on Fridays in that court. (C. 412) The trial court also noted that it had directed that a copy of the order setting the matter for trial on April 13, 1982 be provided to the State. (C. 412) The trial court on its own recollection noted its extra effort in fitting this cause into a trial date. "I

blocked off today and all day tomorrow so we could try this case in two days. I was told it would take approximately two days to try it. I have nothing for two days. The order is in the file. It is a matter of public record." (C. 415)

The court expressly found a lack of diligence on the part of the State and thus denied the continuance. (C. 419)

The State then moved to nolle prosequi the charge. (C. 415) After a hearing, at which the DuPage County State's Attorney responded to the court's inquiries concerning the purpose of the nolle prosequi, the court ruled:

> "I must find that a motion to nolle pros. is merely another motion for continuance, which is part of a continuing course of conduct by the State's Attorney's Office to circumvent my denials of their motions for continuance when I find lack of diligence. Consequently, I'll

> deny the motion for nolle pros." (C. 418-419)

The court then ordered the cause to proceed to trial, had an oath administered to the defendant, and upon the State not going forward with its burden, entered an order acquitting the defendant. (C. 419) The order reads:

> "This matter coming on for trial, pursuant to prior notice and setting, the State's motions for a continuance and Nolle Pros. being denied, and the cause proceeding to trial, the State having failed to call any witnesses and the defendant, Richard Rudi having been duly sworn on oath, the Court finds and it is ordered:
>
> 1) That the defendant, Richard Rudi, is not guilty of the offense of battery herein..." (C. 169)

The State did not take a direct appeal from the trial court's action within the thirty-day statutory period. Rather, the State filed on May 17, 1982, a subsequent

information alleging the very same offense on which the trial court had acquitted the defendant on April 13, 1982. (C. 172)

At the hearing on June 24, 1982, the trial court held that its order of April 13, 1982 remained viable and thus barred a refiling of the same information since such would be a total disregard for the earlier order which had not been challenged in the Appellate Court. (C. 433-434) The court expressly noted that it could not have granted the State's motion for a continuance without relinquishing its control over its own docket. (C. 434) This, the court felt, could not be sanctioned. The court granted the defendant's motion to dismiss, holding that a retrial would violate defendant's double jeopardy

rights as protected by the Fifth Amendment to the United States Constitution. (C. 434)

The State appealed from the judgment of acquittal and from the grant of defendant's motion to dismiss. The Illinois Appellate Court rejected defendant's double jeopardy position and reversed. Defendant was granted leave to appeal by the Illinois Supreme Court, which sustained the Illinois Appellate Court reversal and rejected defendant's double jeopardy claim (see Appendix A) in an opinion dated September 20, 1984, whereupon defendant filed his Petition with this Court.

REASONS FOR GRANTING THE WRIT

An acquittal entered by a State court trial judge after denial of a motion to nolle prosequi made solely to obtain a previously denied continuance, and after the prosecution refused the trial court order to commence trial, whereupon the trial judge commenced a bench trial, ordered defendant sworn as a witness, and determined that he had heard insufficient evidence to sustain a conviction, is an acquittal which bars subsequent prosecution for the same offense under the double jeopardy clause of the Fifth Amendment to the United States Constitution, despite State reviewing court finding of abuse of discretion in denying a motion for continuance and the motion to nolle pros the charge.

In a criminal case, the trial court denied a State motion for continuance, as the court found lack of prosecutorial diligence; the State then moved to nolle prosequi and the court, after a hearing, determined that the State intended to refile the identical charge, and that the

State was using the nolle prosequi as a means to obtain a continuance. The court denied the motion and ordered the State to proceed to trial.[1] The State refused. The court ordered trial to commence; the prosecution refused to present any evidence; defendant was sworn; the court, after determining that there was not sufficient evidence to convict the defendant, found the defendant not guilty. Thirty-four days thereafter, the prosecution refiled the identical charge. The court, after hearing, granted defendant's motion for discharge based on double jeopardy.

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1. Under Illinois law, a defendant may waive his right to jury trial without prosecution consent. Jury trial was so waived in this case.

The Illinois Supreme Court held that the trial court abused its discretion in denying the State's motion for continuance and their motion to nolle prosequi and ruled that the trial and acquittal of defendant did not bar further prosecution on the identical charge. That opinion is founded upon the conclusion that the trial court acted erroneously at the time he denied the State's motion to nolle prosequi. The court stated:

> "In this case, the circuit court's denial of the prosecutor's nolle prosequi motion was an abuse of discretion. There is no indication in the record of intentional delay or harassment by the prosecution." (Opinion, p. 4)

The court, having concluded that the trial court abused its discretion in denying the motion for nolle prosequi

(and hence the motion for continuance) then proceeded to find that the court's action in forcing trial to commence was invalid and that the proceeding was thus not a trial and hence defendant could be retried without violating the prohibition against double jeopardy. The error of the Illinois Supreme Court is that its decision makes the existence or non-existence of a trial turn on the legal rulings underlying the acquittal. This is error because the prohibition against double jeopardy is applicable, barring a subsequent trial where defendant has been acquitted, "even if the legal rulings underlying the acquittal were erroneous." Sanabria v. United States, 437 U.S. 54, 57 L.Ed.2d 43 (1978). The existence of double jeopardy cannot turn on the correctness or incorrectness of

the trial judge's exercise of his authority to control his own court calendar. Application of the rule in Sanabria to the situation presently before the court demonstrates that the Rudi opinion is erroneous.[2]

So far as the defendant is concerned, the propriety of the court's action in forcing the State to trial is irrelevant. Unavoidably, defendant is forced to stand trial when the State is forced to trial. For purposes of double

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2. The wisdom of Sanabria in applying judicial economy to a federal right is obvious. If the applicability of the prohibition of double jeopardy were to turn on the correctness of the legal rulings underlying the verdict, the federal courts would find it necessary to adjudicate the correctness of the State trial court application of the relevant State law in most every case where the State opposed the assertion of double jeopardy.

jeopardy, the sole issue is whether the defendant has been put to trial however improperly. It was no less a trial, because the court acted erroneously, as it is no less a judicial act, because a court, on a matter within its jurisdiction, acts erroneously. Stump v. Sparkman, 435 U.S. 349, 55 L.Ed.2d 331 (1977).

Here, it is evident that although defendant properly asserted his rights to trial on the agreed date, he was actually put to trial because the court, much traumatized by the prosecutor's failure to be ready in this case, and in other cases, instigated and actively pressed the proceeding to go forward to trial. He was put to trial because he was a victim in the battle between the court and the State. It is analogous to the

situation in United States v. Dahlstrum, 655 F.2d 971 (9 Cir. 1981). There, the court, on its own initiative, due to its exasperation over what it considered to be impropriety by agents of the IRS, terminated the trial and dismissed the indictment and entered an order of acquittal. The government appealed. The Court of Appeals for the Ninth Circuit rejected the government's position that it could appeal from the acquittal because the action of the trial court, in terminating the proceedings, was erroneous and not in truth an acquittal. The Court of Appeals held there would still be a violation of the double jeopardy provision because the dismissal was not at the action of the defendant. The court stated:

> "Here, the judge was the instigator and the primary mover

> of the events that led to the dismissal of the indictment. The record convinces us that the judge took complete control of the proceedings and set off on a course over which the appellee had practically no control. Nowhere does it appear that the judge, prior to the oral dismissal of the indictment, even consulted appellee on which course to take...
>
> The entire record indicates that the judge had no interest in completing the trial. Appellee's involvement in the termination of the trial was at best minimal and in no way reached the high degree of participation that was present in Scott. Nor can it be said that appellee retained 'primary control' over the course of the trial." 655 F.2d 971 at 975.

So too, here, defendant was not in control and he was forced to trial. After considering the statements of the prosecutor concerning its reasons for nolle prosequi, the court concluded:

> "I must find that a motion to nolle pros. is merely another motion for continuance, which is part of a continuing course of

> conduct of the State's Attorney's Office to circumvent my denials of their motions for continuance when I find lack of due diligence. Consequently, I'll deny the motion for nolle pros."

The court then instructed the defendant to raise his right hand and administered the oath to defendant. The court then requested the State to present evidence.

> "The Court: Does the State wish to present any evidence?"

The court, upon finding that the State merely wished to make a statement, made a finding that the State had failed to sustain the burden of proof and entered a finding of not guilty.

What occurred, whether the court's actions were appropriate or not, is that defendant was put to trial. Since the trial ended in an acquittal, the double

jeopardy provision prevents the State from again prosecuting the defendant.

The United States Court of Appeals for the Fourth Circuit has, under almost identical circumstances, ruled that a further prosecution of the defendant would be barred. Goolsby v. Hutto, 691 F.2d 199 (4 Cir. 1982).

In a State court proceeding, the prosecutor moved to nolle prosequi after being denied a continuance. The State law in Virginia, as in Illinois, permitted a nolle prosequi with the consent of the court. The trial court denied the motion to nolle prosequi. The prosecutor refused to proceed.

> "Nevertheless, the judge called and swore in a detective who had investigated the matter and who had been subpoenaed as a defense witness. The Commonwealth attorney refused to ask any questions of the witness, so the judge told the witness he was

> free to leave. The judge then stated that jeopardy had attached and dismissed the charge because of lack of evidence." 691 F.2d 199 at 200.

Subsequently, the State filed new charges and defendant was convicted. After direct appeal, defendant filed a petition in the United States District Court which held that jeopardy had attached and granted the writ. The State appealed causing the Court of Appeals for the Fourth Circuit to be confronted with the question of whether jeopardy attaches when, after the court denies a State's motion to nolle prosequi, the court calls a witness, has the witness sworn, takes no evidence and discharges the defendant. After reviewing all decisions of the United States Supreme Court on the issue, the Court of Appeals concluded that, where a witness is sworn and a

defendant discharged, the trial court, having heard insufficient evidence to prove the defendant guilty, jeopardy has attached, and the double jeopardy provision of the Fifth Amendment prohibits further prosecution.

After a thorough analysis of this Court's opinions in Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978), Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975), Lee v. United States, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1975), the court in Goolsby concluded that jeopardy had attached for the following reasons:

> "We also believe that Goolsby was put to trial before the trier of facts. When the general district court denied the motion for nolle prosequi, set the case for trial, and called and swore the first witness, Goolsby was then

> subjected either to conviction or acquittal. The fact that the witness gave no evidence required the acquittal of Goolsby by the general district court, just as his conviction would have been required had the witness given evidence sufficient to sustain his guilt.
>
> Since Goolsby was 'put to trial before the trier of facts,' we think it is reasonable to say that jeopardy attached when 'the first witness ... [was] sworn,' Crist, 437 U.S. at 37 n. 15, 98 S.Ct. at 2162 n. 15, which was the point at which 'the court began to hear evidence,' Serfass, 420 U.S. at p. 388, 95 S.Ct. at p. 1062. Whether or not the witness in fact testified, we think is immaterial, for when the witness was sworn, we think the court began to hear the evidence, and we so hold." 691 F.2d at 202.

The reasoning of Goolsby is sound.

The opinion of the Illinois Supreme Court is in direct conflict with the decision of the United States Court of Appeals in Goolsby v. Hutto, 691 F.2d 199

(4 Cir. 1982). In Rudi, the court stated:

> "The defendant urges that we reconsider Deems in the light of the United States Court of Appeals decision in Goolsby v. Hutto (4th Cir. 1982), 691 F.2d 199. In Goolsby, as in Deems, the trial court denied a prosecution motion for nolle prosequi, swore a witness, and acquitted the defendant when the prosecution failed to elicit any testimony from him. The defendant was reindicted and convicted at a second trial. The Court of Appeals granted habeas corpus on double jeopardy grounds. The only substantial difference between Goolsby and Deems is that in the former the witness who was sworn but did not testify was not the defendant, as in Deems, but an investigating police officer who had been subpoenaed by the defendant. To the extent that the two cases are in conflict, we believe our own precedent is the accurate statement of the law for the reasons we have given." (Opinion, pp. 5-6) (Appendix A)

This court should grant certiorari to resolve the direct conflict between Rudi

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and Goolsby, and because the Illinois court erred in its limitation of the double jeopardy clause, denying defendant his rights under the Fifth Amendment to the United States Constitution.

CONCLUSION

It is respectfully requested that certiorari be granted.

Respectfully submitted,

RICHARD W. CULVER
FREDERICK F. COHN
Counsel for Petitioner

APPENDICES

APPENDIX A

Docket No. 58470-Agenda3-May 1984.
THE PEOPLE OF THE STATE
OF ILLINOIS, Appellee, v.
RICHARD RUDI, Appellant.

JUSTICE SIMON delivered the opinion of the court:

In this case we must review the circuit court's authority under Illinois law to deny a prosecutor's motion for nolle prosequi. We are also called upon to decide whether the circuit court's actions in this case resulted in jeopardy to the defendant under the State and Federal constitutions, thus barring a new trial for the offenses charged. Ill. Const. 1970, art. I, sec. 10; U.S. Const., amend. V.

The defendant, Richard Rudi, was originally charged with battery, aggravated battery and unlawful

restraint. He was convicted of battery in a jury trial, but this conviction was reversed by the appellate court for trial error and the cause was remanded for a new trial (94 Ill.App.3d 856). Upon remand the circuit court entered an order setting the matter "for jury trial on April 13, 1982 at 9 a.m. without further notice."

On April 13 the prosecutor moved for a continuance until April 15. This motion was supported by an affidavit of the assistant State's Attorney who stated that the case had been assigned to her after the trial date had been set, but that the trial date did not appear in the prosecutor's case file. When the assistant State's Attorney called the circuit court clerk's office an employee of the clerk's office she could not

identify erroneously gave her the date of April 16, 1982. Consequently, the assistant State's Attorney caused subpoenas to be issued for all of the State's witnesses to appear on April 16, 1982. The assistant State's Attorney urged that jury selection and opening arguments go forward on April 13 with a continuance to April 15 for the presentation of evidence.

The defendant's attorney objected to the motion for continuance, stating that he had scheduled an expert witness from California, that he had reserved three days for this trial and had no other space on his calendar until June. After the court denied the State's motion, the prosecutor moved to nol-pros the charge.

The State's Attorney of DuPage County personally addressed the court, stating

that he would "very likely *** refile this case because it is clearly in the public interest." He indicated further that his office had "finally found the witnesses to get this case through to a conclusion," and did not wish to forego an opportunity to convict the defendant merely because they could not at that time work out a mutually convenient date for trial. The court denied the State's motion for nolle prosequi:

> "I must find that a motion to nolle pros. is merely another motion for continuance, which is part of a continuing course of conduct by the State's Attorney's Office to circumvent my denials of their motions for continuance when I find lack of due diligence. Consequently, I'll deny the motion for nolle pros."

The court then had the defendant sworn and asked whether "the State's Attorney [wished] to present any evidence or bring

in a jury." When the State's Attorney failed to come forward with any evidence, the trial court entered an order stating "[t]hat the defendant, Richard Rudi, is not guilty of the offense of battery." The State did not appeal this order.

On May 17, 1982, the prosecutor filed a new information charging the defendant with the offense of battery arising from the same circumstances that were the subject of the first information. The circuit court granted the defendant's motion to dismiss the information on the ground of double jeopardy.

The State appealed and the appellate court reversed the circuit court by a Rule 23 order. It held that under the circumstances the circuit court should have granted the motion for a continuance and that in any case the denial of the

State's motion for nolle prosequi was an abuse of discretion because there had been no showing that the State's Attorney's action was capriciously or vexatiously repetitious. The appellate court also held that the dismissal was improper under People v. Deems (1980), 81 Ill.2d 384. The defendant's petition for leave to appeal to this court was allowed (87 Ill. 2d R. 315(a)).

We agree with the appellate court's conclusion that this case is controlled by People v. Deems. Conceding that the defendant had been charged with the wrong offense, receiving stolen property, and that the State had no evidence to convict the defendant of that crime, the prosecutor in Deems sought to dismiss the indictment. The prosecutor acknowledged, however, that he planned to indict the

defendant for the offense of theft. The defendant opposed the motion for dismissal and demanded an immediate trial on the charge in the original indictment. The circuit court denied the prosecutor's motion, called the case for trial, and acquitted the defendant when the State failed to present any evidence against him. The court, on appeal by the State from the dismissal on double jeopardy grounds of a subsequent indictment for theft, disapproved of the procedure adopted by the circuit court in denying the prosecution's motion to dismiss and held that a trial on the new indictment would not violate double jeopardy.

As in People v. Deems, the "trial" held in this case on April 13 "was a sham, an artifice employed by the trial

judge to achieve the result of a dismissal with prejudice for want of prosecution which *** he did not have the authority to order." (People v. Deems (1980), 81 Ill.2d 384, 389; see also People v. Hall (1983), 117 Ill.App.3d 881, 883-84.) Under the circumstances of this case it was an abuse of discretion for the circuit court to deny the prosecutor's motion for nolle prosequi.

The defendant argues that allowing the prosecutor to nol-pros effectively transfers to him the court's power to control its calendar by divesting the circuit court of the authority to enforce its own schedule, thus violating the doctrine of separation of powers. (Johnson v. Theodoron (1927), 324 Ill. 543.) The defendant also contends that the power to nol-pros allows the State an

unfair advantage over the defendant. Neither concern is substantial. Assistant State's Attorneys who fail without valid reasons to honor the court's calendar may be held in contempt. Moreover, in the future a recently enacted statute will permit the court to dismiss an action in cases where the prosecution "has failed to use due diligence in bringing the case to trial" after allowing one last continuance of from 14 to 30 days. Ill.Rev.Stat. 1983, ch. 38, par. 114-4(e).

Likewise, circuit courts have ample authority to protect the legitimate rights of defendants by enforcing the terms of the speedy-trial acts (see People v. Fosdick (1967), 36 Ill.2d 524, 528; People v. Patheal (1963), 27 Ill.2d 269 (voluntary dismissal and subsequent

refiling of charges does not toll the speedy-trial statute); see also People v. Christensen (1984), 102 Ill.2d 321 (enforcement of interstate agreement on detainers)) and invoking the court's inherent authority to guarantee each defendant a fair trial. (People v. Lawson (1977), 67 Ill.2d 449.) These powers enable the circuit court simultaneously to protect the legitimate rights of defendants, maintain respect for its calendar, and satisfy the public interest in the fair and efficient prosecution of those accused of crime.

In this case, the circuit court's denial of the prosecutor's nolle prosequi motion was an abuse of discretion. There is no indication in the record of intentional delay or harassment by the prosecution. The evidence indicates that

the assistant State's Attorney was simply misled by a clerical error and as a result subpoenaed all the State's witnesses for appearance on the wrong date. The record is clear that the prosecutor moved to nol-pros after the court denied her motion for a two-day continuance because she had no evidence available on that day to present against the defendant. Nolle prosequi was called for under these circumstances. People v. Deems (1980), 81 Ill.2d 384.

Although the prosecution was at fault for failing to keep an accurate record of the trial date, dismissal of the charge is an extreme sanction against the public in a case where it has not been shown that the request for nolle prosequi is vexatious or that it will cause substantial prejudice to the defendant.

This was the only nolle prosequi motion in this matter, and it was presented nearly seven years after the crime alleged in this case occurred. The first trial was delayed for nearly two years by numerous motions by the defendant for continuance, and upon remand to the circuit court after reversal of his conviction by the appellate court, the defendant did not demand a speedy trial. There was no showing that the postponement of the trial would deny the defendant a fair trial or violate fundamental principles of fair dealing.

Retrial of the defendant under the new information does not violate the constitutional guarantee that "[n]o person shall *** be twice put in jeopardy for the same offense." (Ill. Const. 1970, art. I, sec. 10; see also U.S.

Const., amend V.) The underlying principle of the guarantee against double jeopardy "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (Green v. United States (1957), 355 U.S. 184, 187-88, 2 L.Ed.2d 199, 204, 78 S.Ct. 221, 223.) The guarantee has been implemented by "rules that specify when jeopardy attaches and that prohibit a retrial of an acquitted defendant. But those rules should not be applied mechanically when the interests they protect are not

endangered and when their mechanical application would frustrate society's interest in enforcing its criminal laws." People v. Deems (1980), 81 Ill.2d 384, 388.

The words "not guilty" which the trial judge used have "'no talismanic quality for purposes of the Double Jeopardy Clause' (Serfass v. United States (1975), 420 U.S. 377, 392, 43 L.Ed.2d 265, 276, 95 S.Ct. 1055, 1064), and what constitutes an acquittal for purposes of the double jeopardy clause is not necessarily controlled by the form of the judge's action [citation], or what the judge calls it [citations]." (People v. Deems (1980), 81 Ill.2d 384, 388.) Although the circuit court ordered the case to "trial" and purportedly "acquitted" the defendant, the trial and

the acquittal had none of the traditional characteristics of such proceedings. The prosecution did not present any evidence, but on the contrary was trying in good faith to dismiss the case. No factual issues were resolved in favor of the defendant, as they are when the case is decided after the State has begun its presentation of evidence (People v. Wiley (1979), 71 Ill.App.3d 641) or when the State's Attorney acquiesces in an order dismissing the charges against the defendant with prejudice (People v. Creek (1983), 94 Ill.2d 526). No jury was sworn.

The defendant, having been sworn as a witness, argues that he was subjected to jeopardy under the traditional rule that jeopardy attaches when the first witness is sworn. (United States v. Martin Linen

Supply Co. (1977), 430 U.S. 564, 569, 51 L.Ed.2d 642, 650, 97 S.Ct. 1349, 1353.)

In People v. Deems, however, this court observed:

> "That rule is predicated upon the fact that the first witness is normally an individual whose testimony is part of the State's case--a prosecution witness whose appearance is a part of the incriminating presentation jeopardizing defendant. Here, the only person sworn was the defendant himself, and he did not testify. No evidence of any type was introduced, and it is clear that defendant was at no time during these proceedings in danger of being found guilty of any offense." (81 Ill.2d 384, 390.)

The "trial" or "acquittal" in this case was no more than a dismissal for want of prosecution, and as was held in Deems such dismissals do not put the defendant in jeopardy or bar retrial on a new indictment.

The defendant urges that we reconsider Deems in the light of the United States Court of Appeals decision in Goolsby v. Hutto (4th Cir. 1982), 691 F.2d 199. In Goolsby, as in Deems, the trial court denied a prosecution motion for nolle prosequi, swore a witness, and acquitted the defendant when the prosecution failed to elicit any testimony from him. The defendant was reindicted and convicted at a second trial. The Court of Appeals granted habeas corpus on double jeopardy grounds. The only substantial difference between Goolsby and Deems is that in the former the witness who was sworn but did not testify was not the defendant, as in Deems, but an investigating police officer who had been subpoenaed by the defendant. To the extent that the two cases are in conflict, we believe our own

precedent is the accurate statement of the law for the reasons we have given.

The judgment of the appellate court is affirmed, and the cause is remanded to the circuit court for trial on the second information. As was done in Deems, in the exercise of our supervisory power (Ill. Const. 1970, art. VI, sec. 16; 87 Ill.2d R. 315(a); People v. Breen (1976), 62 Ill.2d 323), we direct the circuit court to vacate the judgment of "not guilty" and allow the State's motion for nolle prosequi. People v. Deems (1980), 81 Ill.2d 384, 391.

Appellate court affirmed;
supervisory order entered.

APPENDIX B

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant, vs.
RICHARD RUDI, Defendant-
Appellee.

No. 82-516 & 82-560 Cons.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Richard Rudi, the defendant, is an oral surgeon who was originally indicted for aggravated battery, battery, and unlawful restraint arising from alleged misconduct with a patient on July 26, 1976. He was found guilty of battery only, in a jury trial, and was subsequently fined $1,000. On appeal in People v. Rudi (1981), 94 Ill.App.3d 856, this court reversed the judgment of conviction because of trial error and remanded for a new trial.

On February 17, 1982, an order was entered setting the case for jury trial

on April 13, 1982, "without further notice." On April 13, 1982, assistant State's Attorney Nancy K. Wilson, moved for a continuance of the trial until April 16, and filed an affidavit in which she stated that during the first week of March 1982, she was assigned to prosecute the case; that her case file did not show the trial date; that she contacted the clerk's office sometime after the first week of March 1982 and was informed that the trial date was April 16, 1982; that she did not know who in the clerk's office gave her this information that she had made transportation arrangements for the victim of the battery to travel from Minnesota to Illinois on April 16, 1982; that the State had arranged for four other witnesses to testify on April 16, 1982; that subpoenas had been issued

returnable April 16, 1982, (two subpoenas are found in the record); that affiant had exercised due diligence in preparing for trial but had erroneously made arrangements for this trial on April 16; and that the State was prepared to select a jury and make an opening statement on April 13, 1982, but could not produce witnesses until Friday, April 16, 1982.

During argument on the motion, the State indicated it could put on several witnesses on April 15. Defendant's counsel opposed any continuance and stated he had a witness from California who was to testify; that he would be unable to try the case on April 16, 1982; and that his calendar was "booked well into June." He also argued that Wilson had been at a March 3, hearing when the specific trial date was discussed;

however, the transcript of that hearing does not reveal this.

The trial court commented that "we don't do juries" on Friday. When ruling on the State's motion for continuance, the court stated: "I blocked off today and all day tomorrow so we could try this case in two days. I was told it would take approximately two days to try it. I have nothing for two days. The order is in the file. It's a matter of public record." The court then denied the State's motion for continuance. The State then "announce[d] [its] intention" to nolle pros. The court asked if the State intended to refile the charges, and the State's Attorney told the court he would not say whether or not he intended to refile since that was "the exclusive right of the prosecutor."

The trial court denied the motion to nolle pros stating it was "part of a continuing course of conduct by the State's Attorney's office to circumvent my denials of their motions for continuance when I find lack of due diligence." The trial court then administered the oath to defendant and asked the State if it wished to present any evidence. The State indicated it had a statement to make. The court then said: "pursuant to People v. Mooar 416 N.E.2d 81, the court finds the State has failed to sustain their burden of proof." The court then found defendant not guilty.

On May 17, 1982, the State filed an information charging defendant with battery based on the same conduct that was at issue in the original case.

Defendant moved to dismiss this information claiming double jeopardy. On July 2, 1982, the trial court entered a written order that the information be dismissed because it was barred by the April 13, 1982, judgment of acquittal and the July 2, 1982, order dismissing the information.

In its appellate brief, the State maintains the procedure employed by the trial court in finding the defendant not guilty was improper and that the judgment of acquittal should be reversed. It also contends the dismissal of the later-filed information was erroneous since jeopardy never attached at the original proceedings. In his appellate brief, defendant asserts that the trial court properly denied the State's motion for a continuance for the lack of due diligence

of the State and properly denied the State's motion to nolle pros as an attempt to circumvent the court's prior ruling. He also argues that the dismissal of the later-filed information was proper citing Goolsby v. Hutto (4th Cir. 1982), 691 F.2d 199. In its reply brief, the State answers that it exercised due diligence, that the trial court abused its discretion in denying the State's motion to nolle pros, and that Goolsby is contrary to Illinois law.

In People v. Verstat (1983), 112 Ill.App.3d 90, 11 cases consolidated on appeal arising from the circuit court of DuPage County (10 of which had been tried before the same trial judge as in this case), this court extensively examined the relevant cases and statutes pertaining to a motion for continuance in

criminal cases, a motion to nolle pros by the State, and appeal from a judgment of acquittal by the State under circumstances similar to those present in this case. Our decision in Verstat is direct precedent for our decision on the legal issues presented before us in this appeal.

Addressing the State's motion for continuance in the court below first, we note that this was its first request for continuance after our decision in People v. Rudi, the motion was supported by affidavit stating a plausible reason for the continuance, no prejudice to the defendant is evident from this record, and subpoenas for an April 16 trial date are found in the record supporting the claim in the affidavit of a mistaken trial date. The court could have

commenced jury selection on April 13 and the State was able to begin with its witnesses on April 15. Under all the facts in this record, the denial of the State's motion for continuance was an abuse of discretion. (See People v. Verstat.) Even if there were no abuse of discretion in denying the motion for continuance, the trial court was without authority to proceed to a "trial" and find defendant not guilty, as it did, under the facts here. (People v. Verstat.) Furthermore, the denial of the State's motion to nolle pros was an abuse of discretion where there was no showing that the State's Attorney's action was "capriciously or vexatiously repetitious." (People v. Verstat.) Finally, the dismissal on double jeopardy grounds of the State's later-filed

information under the circumstances was improper under the holding in People v. Deems (1980), 81 Ill.2d 384. (See also People v. Verstat; People v. Edwards (1981), 97 Ill.App.3d 407.) As Goolsby v. Hutto, cited by defendant, is contrary to our Supreme Court's decision in Deems, we decline to follow Goolsby.

For the foregoing reasons, we reverse both the judgment of acquittal in No. 82-516 and the order of dismissal in No. 82-560, and remand both cases to the circuit court.

REVERSED and REMANDED

REINHARD, LINDBERG, VAN DEUSEN